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No. 432

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In the Supreme Court of the United States

JULIAN PEREZ,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above-entitled cause on July 31, 1968.

OPINIONS BELOW

The opinion of the Court of Appeals has not yet been reported but is reproduced herein as Petitioner's Appendix A.

JURISDICTION

The opinion and judgment of the Court of Appeals for the Seventh Circuit was filed and entered on July 31, 1968. No petition for rehearing was filed. The jurisdiction of this Court is invoked under Title 28 USC 1254.

QUESTION PRESENTED

1. Whether the opinion of the Court of Appeals deprives Petitioner of his constitutional right to a speedy trial as guaranteed by the Sixth Amendment.

STATUTES INVOLVED

The statute Petitioner was convicted of violating is Title 18 USC 2113(d), bank robbery. No question is raised as to the application of that statute in this proceeding. Other statutes which are peripherally involved are the Arkansas Statutes relating to "removal of a person in confinement", Arkansas Statutes 43-2607 which is reproduced herein as Petitioner's Appendix B and Title 28 USC Section 2241 relating to the power of district courts to grant writs of habeas corpus.

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provision involved is the Sixth Amendment to the Constitution of the United States of America, and particularly that part which reads "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, . . ."

STATEMENT

Petitioner, with two others, was charged with violation of Title 18 USC 2113(d), bank robbery. An information charging the offense was filed in April of 1965 and was superseded by an indictment returned on June 23, 1965. The offense was alleged to have occurred on November 19, 1961. One of the defendants, Paramo, entered a plea of guilty on December 14, 1965, and subsequently testified as a witness for the Government in the trial of the other defendant, Zurita, and in the trial of the Petitioner. The defendant, Zurita, was tried on December 20, 1965, and was found guilty.

At the time the information was filed and the indictment returned, Petitioner was incarcerated in the Arkansas State Penitentiary having been committed there as a result of a judgment of conviction of the crime of armed robbery by the Circuit Court of Garland County in Hot Springs, Arkansas. A sentence of six years was imposed upon Petitioner and the execution of that sentence was commenced on October 5, 1963. While in custody in the Arkansas State Penitentiary, he was served with a Federal warrant in June of 1965 charging him with the commission of the offense upon which he was ultimately convicted.

He was released from the Arkansas State Penitentiary on March 10, 1967, and delivered to a United States Marshal who returned him to the Northern District of Indiana to stand trial on the charge. The cause was submitted to trial by jury on July 19, 1967, and the jury returned a verdict of guilty on July 20, 1967. On September 13, 1967, the Court entered judgment and sentenced the Petitioner to a term of imprisonment of twenty years. Petitioner was admitted to bail pending appeal.

The sole error relied upon in the appeal to the United States Court of Appeals and in this proceeding is predicated upon the denial of Petitioner's Motion to Dismiss which is reproduced herein as Petitioner's Appendix C. The substance of the Motion to Dismiss asserts that Petitioner was deprived of his Sixth Amendment right to a speedy trial by the failure of the Government to take affirmative action to bring him to trial.

REASONS FOR GRANTING THE WRIT

I.

THE OPINION OF THE COURT OF APPEALS DEPRIVES THE PETITIONER OF HIS CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL.

The question raised on this appeal was presented to the trial court by Motion to Dismiss. (App. C.) The Government, in opposition to the Motion to Dismiss, filed an affidavit by the Assistant United States Attorney stating in substance that some time in November of 1965 the affiant had two telephone conversations with the Warden of the Arkansas State Penitentiary in which he was advised by the Warden that Petitioner would not be made available to Government authorities for trial in December of 1965 and that he would not comply with a writ of habeas corpus ad prosequendum should the Government attempt to have such a writ issued. The United States Attorney further stated in that affidavit that he was advised by the Warden that the Petitioner could not be available to Federal authorities to be released for trial before December of 1966. The memorandum in opposition to the Motion to Dismiss and the affidavit of the Assistant United States Attorney is reproduced herein as Petitioner's Appendix D.

On the submission of the Motion to Dismiss, Petitioner testified that in June of 1965, while he was confined in the Arkansas State Penitentiary, he was advised by a prison official that he had been charged with robbery in Indiana. No one advised him that he had a right to demand a speedy trial, nor was he aware that such a right existed. At no time did he have an opportunity to obtain counsel. He

stated that if he had been aware of his right to demand immediate trial he would have done so since the detainer lodged against him made him ineligible for parole. He was approached on numerous occasions by F.B.I. agents who told him that if he confessed he could be brought to trial in Little Rock, Arkansas, if he would plead guilty. The testimony on the Motion to Dismiss is reproduced herein as Petitioner's Appendix E.

The opinion of the Court of Appeals affirming the judgment of conviction exonerates the conduct of the Government by finding that the Arkansas Rendition Statute is not obligatory but is merely permissive. This argument begs the question: The issue is not what the State of Arkansas would have been required to do had the Government pursued a writ of habeas corpus ad prosequendum but what the Government failed to do to attempt to obtain the presence of the Petitioner for trial when the co-defendant, Zurita, was tried in December of 1965. The lack of effort on the part of the Government cannot be condoned merely because the prosecution of such a writ may not have been successful. What is required is a bona fide effort, something more than two telephone calls to the Warden of the State Penitentiary one month before the trial of the co-defendant, Zurita.

Particularly significant in this context is the recently decided case by the Court of Appeals of New York in *People* v. *Winfrey,* 1967, 20 N.Y.2d 138, 281 NYS.2d 823. In *Winfrey,* the Defendant had been imprisoned in Alabama. Alabama was not a party to the Uniform Agreement on Detainers Act which provides for the automatic release of prisoners for prosecution in another state. He was imprisoned for a nine-month period after the return of the indictment in New York. In resisting a Motion to

Dismiss, the prosecution argued that since Alabama was not a party to the Uniform Agreement on Detainers Act, a request for release of the Defendant before his sentence was completed would have had a dubious result. The Court of Appeals in reviewing this argument noted that Alabama makes provision for transfer of defendants to other states at the discretion of the Governor and no such request was made. The Court of Appeals held that the failure of the New York officials to take action toward securing the presence of the Defendant violated the due process clause of the Fourteenth Amendment. In the opinion rendered by the Court of Appeals in the instant case, the argument made by Petitioner setting forth the *Winfrey* doctrine is completely ignored.

It should also be noted that another Arkansas Statute, the Uniform Extradition Act, provides:

> "If a criminal process has been instituted against such person under the laws of this State and is still pending, the Governor, at his discretion, either may surrender him on the demand of the executive authority of another state or may hold him until he has been tried and discharged or convicted and punished in this state." Arkansas Statute 43-3019.

The opinion of the Court of Appeals concedes that there is a

> ". . . trend toward requiring available advice of counsel in more and more instances and the disfavor in which Courts hold long delays in bringing incarcerated prisoners to trial. . . ." (pp. 5, 6, Opinion of Court of Appeals)

The American Bar Association has recently adopted a report setting forth standards relating to speedy trial, part of which is reproduced herein as Petitioner's Appendix F. The conduct of the Government in the case at bar

falls far short of those minimum standards in the following respects:

A. The United States Attorney failed to undertake to obtain the presence of the prisoner for trial *promptly*. The information was filed in April of 1965. The United States Attorney knew that the Defendant was incarcerated in Arkansas at the time; yet, it was not until November of 1965, more than six months after the information had been filed, that the United States Attorney made any gesture toward obtaining the presence of the defendant to be available for the trial of the co-defendant, Zurita, in December of 1965. Two telephone calls to the Warden of the state prison can scarcely be regarded as a bona fide effort to obtain the presence of the prisoner promptly.

B. Although a detainer was filed with the official having custody of the defendant, the United States Attorney did not request that official to advise the prisoner of his right to demand trial.

C. The official having custody of the Petitioner did not promptly advise the Petitioner of his right to demand trial. The evidence is uncontradicted that not only was there a complete failure on the part of any official or Government agent to advise the Petitioner of his right to demand trial, but that Petitioner was unaware that such a right existed.

Thus, the Government failed to conform to any of the minimum standards relating to a speedy trial adopted in the American Bar Association Project on Minimum Standards for Criminal Justice. Although this issue was extensively argued before the Court of Appeals and was raised at considerable length in the Brief, the opinion of the Court of Appeals, except for the sparse quote hereinabove set forth, ignores this issue.

II.

FAILURE OF THE GOVERNMENT TO ADVISE PETITIONER OF HIS RIGHT TO DEMAND TRIAL DISPENSES WITH THE NECESSITY FOR SUCH DEMAND.

In light of *Miranda* v. *Arizona,* 1966, 384 U.S. 436, 86 S.Ct. 1602, the "demand rule" of *U.S.* v. *Lustman,* C.A. 2 (1957), 258 F.2d 475 is no longer viable. The right to counsel to a person already in custody cannot be less significant or less meaningful than the right to counsel of a person who prior to the time he is arrested has been at liberty. The need for the guidance and instruction of counsel for the prisoner already in custody is equally imperative. The consequences which may result from the lack of counsel to the prisoner in custody are equally pernicious. It is patently absurd to presume that a prisoner in custody is aware of his right to demand a speedy trial and when he fails to make such demand, blithely state that he has waived a fundamental constitutional right.

Waiver presupposes knowledge of a right and an intelligent and knowing determination to forfeit that right. There is a presumption against waiver of fundamental constitutional rights and the acquiescence in the loss of fundamental rights is never presumed. *Taylor* v. *U.S.,* C.A.D.C. 1956, 238 F.2d 259; *Johnson* v. *Zerbst,* 1938, 304 U.S. 458. This Court in considering the Sixth Amendment right to a speedy trial in another context has stated:

> "The history of the right to a speedy trial and its inception in this country clearly establishes that it is one of the most basic rights preserved by our Constitution." *Klopfer* v. *North Carolina,* 1967, 386 U.S. 15, 87 S.Ct. 988.

Illustrative of the judicial trend in this area is the recent District Court opinion by Judge Youngdahl in *U.S.* v. *Reed,* USDC, DC 5/29/68, reported in BNA 3 CrL 2267. The District Court there held that a resident of the District of Columbia who was indicted on a car theft charge while serving a Maryland prison sentence was entitled to discharge because of a 26-month delay after his indictment. The delay in the prosecution was due to the carelessness of the District of Columbia officials which was compounded by the negligence of the Maryland authorities who had misplaced the detainer lodged against the Defendant while he was imprisoned there.

While the factual situation in *Reed* is markedly distinguishable from the factual situation in the case at bar, the rationale which prompted the trial court to order the discharge of the Defendant in *Reed* is applicable here. Of particular significance is the statement of Judge Youngdahl:

> " . . . there is no waiver of one's speedy trial right where the Defendant has no knowledge of the pending charge *or where he is powerless to assert his right because of imprisonment, ignorance and lack of advice.*" (At p. 2268; our emphasis)

The guidelines laid down by this Court in *Miranda,* at least insofar as the right to advice of counsel is concerned, should logically be extended to prisoners already in custody under a commitment from another jurisdiction. The record in this case discloses that the Petitioner had no knowledge of what his rights were upon being served with the warrant of arrest in June of 1965. If upon being interrogated by the F.B.I. agents he was not advised of his right to remain silent and that any statement he made would be used in evidence against him, and he had made

a confession without benefit of the Miranda warnings, there is no doubt that such a confession would have been inadmissible in the trial of his cause. The rationale requiring the *Miranda* warnings is based in part upon the need to preserve a Defendant's constitutional privilege against self-incrimination.

The logical query, therefore, is: Does the Sixth Amendment right to a speedy trial attain the same dignity and stature as the Fifth Amendment privilege against self-incrimination? Nothing in the history of either amendment or in decisions rendered by this Court interpreting either amendment suggests that one stands on a higher plane than the other. Indeed, this Court has stated in *Klopfer* that the right to a speedy trial is a basic right preserved by our Constitution.

The "demand rule" of *Lustman* and the guidelines laid down in *Miranda,* particularly with reference to the right to counsel, cannot co-exist; one must give way to the other. If it is conceded that the Sixth Amendment right to a speedy trial is of equal stature and dignity as all of the other rights accorded by our Constitution, *Lustman* has outlived its usefulness; the unrealistic requirement that the prisoner make demand emasculates and renders meaningless the right to a speedy trial.

The Court of Appeals for the Fourth Circuit has cited with apparent approval the American Bar Association Project of Minimum Standards for Criminal Justice in the recent case of *Pitts* v. *North Carolina,* C.A. 4, BNA 3, CrL 2105, 4/1/68. In the *Pitts* case, the argument was advanced that the Defendant had waived his right to a speedy trial for failure to make demand of the same. The Court of Appeals there noted that there are well-recognized exceptions to the demand rule. In *Lustman* and

in *Chinn* v. *U. S.*, C.A. 4, 228 F.2d 151 (1955), those exceptions are where the Defendant has no knowledge of the pending charge and where the Defendant is powerless to assert his right because of imprisonment, ignorance and lack of legal advice. *Hill* v. *U.S.*, C.A. 4, 310 F.2d 601 (1962); *U. S.* v. *Chase*, N.D. Ill., E.D. (1955) 135 Fed. Supp. 230.

The opinion of the Court of Appeals in the *Pitts* case discloses extensively the adverse side effects and prejudice which result when an inter-state detainer is placed against a prisoner in custody. Among the consequences resulting from such an action are that the detainee is seriously hampered in his request for parole or commutation. It should be noted that in Petitioner's Motion to Dismiss in the case at bar, Petitioner specifically alleges that the detainer resulted in his serving the maximum sentence in Arkansas and Petitioner specifically testified that the detainer made him ineligible for early parole. **(App. C, D)**

In *Pitts*, the Court, after citing the ABA Report on Standards relating to speedy trial and noting the section that would require the prosecutor upon filing a detainer that the prisoner be advised of the charge and of his right to demand trial concludes:

> "Since this ingredient of basic fairness was excluded by keeping the prisoner in ignorance of his right to demand a trial, we will not hold that he has waived his fundamental right to a speedy trial by failing to seek an immediate hearing 7 years after the prosecution had initiated proceedings against him." (at p. 2106)

CONCLUSION

Under the provisions of 28 USC 2241, the District Court had the power and authority to issue a Writ of Habeas Corpus ad prosequendum. The Government at no time attempted to invoke this statutory procedure. Similarly, no request was ever made upon the Governor of the State of Arkansas under the provisions of Arkansas Statutes 43-3019 to surrender the Petitioner for trial. Whether or not a defendant, and particularly this Petitioner, should have been released for trial should not be dependent on the whim or caprice of a State police officer. There should have been minimally a judicial determination that the State of Arkansas would not surrender the Petitioner for trial. The procedure sanctioned by the Court of Appeals in the instant case lodges the protection of a fundamental constitutional right in the tender hands of the police. The history of the administration of criminal justice has time and again clearly demonstrated that policemen are vocationally inept to fulfill this trust.

The judgment should be reversed.

Respectfully submitted,

MAX COHEN
Attorney for Petitioner

APPENDIX

APPENDIX A.

In the

United States Court of Appeals

For the Seventh Circuit

SEPTEMBER TERM, 1967 — APRIL SESSION, 1968

No. 16536
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
JULIAN PEREZ,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.

July 31, 1968

Before CASTLE, *Chief Judge,* HASTINGS, *Circuit Judge,* and KNOCH, *Senior Circuit Judge.*

KNOCH, *Senior Circuit Judge.* Julian Perez, defendant-appellant, and two co-defendants were indicted on a charge of bank robbery in violation of Title 18 U.S.C. §2113(d) in that on November 20, 1961 by force and violence they took a sum in excess of $69,000 belonging to a bank whose deposits were insured by the Federal Deposit Insurance Corporation, in the course of which they assaulted two persons whose lives they put in jeopardy by use of a pistol. The indictment was returned June 23, 1965; an information was filed in April 1965.

In December 1965 one co-defendant, Jesse Paramo, pleaded guilty. Shortly thereafter the second co-defendant, Manuel Zurita was tried and found guilty.

The defendant-appellant was serving a sentence in the Arkansas State Penitentiary when the information was filed. In June 1965 a federal warrant was served on him there. On his release from the Arkansas State Penitentiary on March 10, 1967 he was taken in custody and returned to the Northern District of Indiana to answer this charge. After a jury trial he was found guilty and sentenced to serve twenty years.

The sole error charged is denial of defendant's motion to dismiss based on alleged denial of a speedy trial by failure of the government to take affirmative action to bring him to trial earlier.

The sufficiency of the evidence to sustain a conviction is not questioned. There was evidence that the three defendants obtained entry to the home of the bank manager on a pretense of being deputy sheriffs, that they held him and his wife captive all night, that in the morning appellant and Zurita forced the bank manager to open the vault and night depository and left him in the bank bound to a pipe. The third co-defendant Paramo testified that he remained in the bank manager's home for about fifteen minutes with the wife and then left.

Appellant contends that he was prejudiced by the delay in trial. He did not testify. Evidence was offered to show he was at work on the day of the robbery November 20, 1961, a Monday. His wife testified that he was at home the night of November 19, 1961, a Sunday night, because he had never stayed away all night at any time since they were married. She said he always worked on

Mondays because Tuesday was his day off during the week in 1961.

Appellant argues that he was deprived of the helpful testimony of witnesses who at the time of the trial were no longer available (none such are mentioned, however) or whose recollection had become obscure.

Two fellow employees testified that they thought that Tuesday was the appellant's day off in 1961 but neither could remember positively because of the lapse of time. A work record showed that appellant worked forty hours during a period which included Monday, November 20, 1961, but it did not indicate which days he worked.

It is mere conjecture that these witnesses would have had clearer recollections in December 1965 and would have given more compelling testimony. On rebuttal F.B.I. Agent Rene J. Dumaine testified to a contemporary record of a statement by one of those witnesses, Albert Specht, the cashier where appellant worked, who on October 21, 1963, said that Monday was the appellant's regular day off. At the trial Mr. Specht did not recall making that statement. A partner in the concern, Mitchell Obuchowski on a later occasion had first told Agent Dumaine that appellant's day off was Tuesday, and then had come back after a conversation with Edward Rzeznick, another employee (who testified at the trial) and told Agent Dumaine that it was Monday. We find no indication of any substantial prejudice resulting from the delay, as claimed.

Appellant complains that he was deprived of his eligibility for parole in Arkansas because of the federal detainer placed against him. As noted in the colloquy at the time of passing sentence, there is no assurance

or even indication from the record that appellant would have been paroled in the minimum time had the hold order not been on file.

Appellant contends further that he was deprived of the possible benefit of having the Trial Judge order the federal sentence to run concurrently with the Arkansas sentence. However the Trial Judge in this case commented on this point in passing sentence and clearly stated that he was taking this factor into consideration and was giving appellant full credit for the time served in Arkansas.

Both parties cite *Simmons* v. *United States*, 2 Cir., 1964, 338 F. 2d 804, where the Court (at page 807) set out four relevant factors for consideration of a claim that speedy trial under the Sixth Amendment was denied: (1) length of delay, (2) reason for delay, (3) prejudice to defendant, and (4) waiver, if any.

In June 1964, co-defendant Paramo, while hospitalized for a period of about a year in a tuberculosis hospital, made a confession implicating the other two co-defendants, and was arrested on release from that hospital in April 1965.

It is apparent from the testimony of the bank manager and from that of Special Agent Dumaine that the federal agents and the local police were engaged, continuously from the date of the crime, in efforts to identify the offenders. The confession of Paramo was a turning point in the investigation but did not in itself terminate that investigation.

The District Court spoke of his own recollections of the Zurita trial and said that the delay could not be charged to the government because of lack of "sufficient identity and evidence" to warrant earlier indictment.

Appellant contends that the State of Arkansas could not have refused to deliver him on a writ of habeas corpus ad prosequendem obtained in a federal court. Assistant United States Attorney Richard F. James in his affidavit described two telephone conversations early in November 1965 with the Warden of the Arkansas Penitentiary (in his efforts to secure appellant's presence for trial in the District Court in December 1965) in which the Warden specifically stated that the Arkansas authorities would not comply with such a writ.

The Arkansas statutes quoted by appellant, reading in part:

> A person committed to prison in custody of an officer, for any criminal offense, shall not be removed from said prison or delivered to the custody of any other officer, except in the following cases: By writ of habeas corpus, or some other legal writ: When he *may be* delivered to an officer, to be removed to some common jail. . . . . Arkansas Statutes 43-2607
>
> * * * *
>
> If a criminal prosecution has been instituted against such person under the laws of this State and is still pending, the Governor *at his discretion* either may surrender him on demand of the executive authority of another State or may hold him until he has been tried and discharged, or convicted and punished in this State. Arkansas Statutes 43-3019 [emphasis added]

all show language which is permissive in nature and not obligatory.

In *Strand* v. *Schmittroth*, 9 Cir., 1957, 251 F. 2d 590, *cert. dism.* 355 U.S. 886, the Court said (at page 599):

> Where the body of the accused is in manual possession of one sovereign, surrender can be obtained by another such sovereign only by consent of the first or by force. The latter is unthinkable.

In *United States ex rel. Moses* v. *Kipp,* 7 Cir., 1956, 232 F. 2d 147, 150, Judge Duffy speaking for this Court, said:

> The United States District Court for the Northern District of Illinois could not have compelled the State of Michigan to surrender Moses after he had been incarcerated in that state for violation of a Michigan law. In spite of the terminology of the writ, the consent of Michigan authorities was necessary to obtain the custody of Moses.

The Court in *Strand* v. *Schmittroth, supra,* (at page 610) quoted with approval the opinion in *Vanover* v. *Cox,* 8 Cir., 1943, 136 F. 2d 442, 443-444, cert. den. 320 U.S. 779:

> A person who has violated the criminal statutes of both the federal and a state government may not complain of the order in which he is tried or punished for such offenses. The interested sovereigns may arrange the order of trial and punishment according to their convenience.

See also *Stamphill* v. *Johnston,* 9 Cir., 1943, 136 F. 2d 291, 292, cert. den. 320 U.S. 766.

Although the appellant asserts that the sole information given him by the Federal Bureau of Investigation agents while he was in the Arkansas Penitentiary related to his right to plead guilty and be sentenced by the Court in Little Rock, Arkansas, he was fully aware that he had been indicted. Appellant argues that he should not be considered to have waived his right to a speedy trial. He urges that the harsh rule of *United States* v. *Lustman,* 2 Cir., 1957, 258 F. 2d 475, 478, cert. den. 358 U.S. 880 (that no valid claim of denial of the right to a speedy trial may be asserted unless the defendant has made a demand for trial) ought to be ameliorated. He refers to the trend toward requiring available advice of counsel in more and more instances and the disfavor in which Courts hold long delays

in bringing incarcerated prisoners to trial. We have considered all the cases and authorities cited by counsel, but conclude that the circumstances of the case before us do not justify abandonment of the established rule. We share the view of the Court in *United States* v. *Maxwell,* 2 Cir., 1967, 383 F. 2d 437, 441, cert. den. 389 U.S. 1043 and 1057, which stated:

> Aware that their claims are barred under *Lustman,* appellants invite us to abandon the so-called demand rule which we have consistently applied in a constantly lengthening line of cases. [citing cases] We decline the invitation, however, because the reasoning of *Lustman,* that the demand rule is consonant with the bulk of federal authority and preserves the speedy trial right as a shield for the defendant's protection but not as a sword for his escape, is still to us persuasive.

The judgment of the District Court is affirmed.

Affirmed.

A true Copy:
Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B.

ARKANSAS STATUTES

Removal of a Person in Confinement

"A person committed to prison in custody of an officer, for any criminal offense, shall not be removed from said prison or delivered to the custody of any other officer, except in the following cases: By writ of habeas corpus, or some other legal writ: When he may be delivered to an officer, to be removed to some common jail . . . When the person is charged, by affidavit, with treason or felony, committed in some other State or Territory of the United States of America, in which case he shall, on the demand of the executive of such State, or the Governor of a Territory in the United States, from which he fled, be sent thither in custody, by order of any circuit court or judge thereof, or may be bound by recognizance, with good security, by said court or judge, to appear at the proper time and place, and surrender himself to the court or tribunal having jurisdiction of the offense, if the said court or judge shall, upon consideration of the evidence, be of the opinion he should be put upon his trial." Arkansas Statutes 43-2607

Uniform Extradition Act

"If a criminal prosecution has been instituted against such person under the laws of this State and is still pending, the Governor at his discretion either may surrender him on the demand of the executive authority of another State or may hold him until he has been tried and discharged, or convicted and punished in this State." Arkansas Statutes 43-3019

"Subject to the qualifications of this act, and the provisions of the constitution of the United States controlling, the acts of Congress in pursuance thereof,

it is the duty of the Governor of this state to have arrested and delivered unto the executive authority of any other state of the United States any person charged in that state with treason, felony, or other crime, who has fled from justice and is found in this state." Arkansas Statutes 43-3002

"No demand for the extradition of a person charged with a crime in another State shall be recognized by the Governor unless in writing and accompanied by a copy of an indictment found or by an information supported by affidavit in the State having jurisdiction of the crime, or by a copy of an affidavit made before a magistrate there, together with a copy of any warrant which was issued thereon. The indictment, information or affidavit made before the magistrate must substantially charge the person demanded with having committed a crime under the law of that State; and the copy must be authenticated by the Executive Authority making the demand, which shall be prima facie evidence of its truth." Arkansas Statutes 43-3003

28 U.S.C. SECTION 2241, POWER TO GRANT WRIT

"(a) Writs of habeas corpus may be granted by . . . the district courts within their respective jurisdictions . . .

(c) The writ of habeas corpus shall not extend to a prisoner unless—

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or . . .

(5) It is necessary to bring him into court to testify or for trial . . ."

APPENDIX C.

MOTION TO DISMISS

Comes now the defendant Julian Perez and moves the Court to dismiss the indictment and as grounds for dismissal alleges and says:

1. Defendant with two others was charged by way of indictment on June 23, 1965, with violation of Title 18, U. S. C., Section 2113 (d).

2. At the time defendant was indicted he was confined in the Arkansas State Penitentiary at Grady, Arkansas, having been in custody in said penitentiary since October 6, 1963.

3. Defendant was in custody in said state penitentiary by virtue of a conviction of robbery in the Garland County Circuit Court, Hot Springs, Arkansas, in May of 1963; defendant was sentenced to a term of six years imprisonment and was confined in said penitentiary until March 10, 1967, at which time he was released to the custody of a United States Marshal and by him delivered to the Lake County Jail to answer this charge; defendant has been admitted to bail since on or about March 4, 1967.

4. That while defendant was incarcerated in the Arkansas State Penitentiary he was served with a warrant of arrest on the indictment in the case at bar; that he was served with said indictment on or about the 30th day of June, 1965.

5. After having been served with said indictment the Government made no attempt to obtain a writ of habeas corpus ad prosequendum to have said defendant answer the charge and stand trial in the Northern District of Indiana.

6. That by virtue of the delay in trial defendant has been prejudiced in the following respects:

a. He was not eligible for early parole due to the detainer that the federal authorities had placed upon him with the authorities of the State of Arkansas.

b. In the event defendant would be convicted of the charge he will have been deprived of the benefit of having any sentence imposed by this Court run concurrently with the sentence he was serving in the Arkansas State Penitentiary.

c. Witnesses upon whom the defendant is relying and intends to rely in the trial of this cause are now unavailable or their recollection has become obscure in regard to the events to which they would be called upon to testify.

d. Defendant has been denied his constitutional right to a speedy trial.

7. At the time defendant was served with said warrant of arrest he was not represented by counsel, did not have the advice of counsel and was not advised of any of his rights so that he could make an intelligent decision as to whether or not to insist upon immediate trial or to resist extradition. Defendant is a lay person of limited education with no legal background or knowledge and was not aware of any of the consequences of his actions when he was served with said warrant of arrest.

Wherefore, defendant prays that the Court dismiss the indictment and that he be discharged.

.....

Max Cohen
Attorney for Defendant,
Julian Perez

APPENDIX D.

MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS

The defendant, Julian Perez, has moved the Court to dismiss the pending indictment in the above-captioned matter on the ground that he has been denied a speedy trial in violation of the 6th and 14th Amendments to the Constitution of the United States. Numerous authorities are cited in the memorandum brief, filed in support of that motion.

The government concedes that, had there been a lengthy and unnecessary delay in the bringing to trial of the defendant, the motion now before this Court would have had merit. However, in the case at hand, although the crime for which Perez is under indictment is alleged to have occurred in November, 1961, an indictment was not returned against either him or the two co-defendants until June, 1965. One co-defendant entered a plea of guilty and another was tried and convicted in this Court on December 14, 1965. Prior to that trial the government attempted to secure the presence of the defendant Perez in Hammond so that he could be tried jointly with the defendant Manuel Zurita, but was unsuccessful due to the lack of cooperation on the part of the Arkansas authorities. The attempts by the government and the negative results are more specifically set forth in the affidavit of Richard F. James, which affidavit is attached hereto and made a part of this memorandum.

The delay in the prosecution of this matter has not, by the standards set forth in the cases cited in the brief in support of defendant's motion, been unusually long or

unreasonable, in view of the fact that the defendant was not available for trial because of incarceration in the State of Arkansas. As pointed out by the defendant, the right of a speedy trial is necessarily relative. In the present case, the defendant Perez could not be tried until he was released from custody in Arkansas. This release was not effected until February, 1967. Failure to bring Perez to trial during that period could not be avoided.

In the instant case, the defendant Perez had been interviewed and advised of the indictment against him by Agents of the Federal Bureau of Investigation during the period of his incarceration in Arkansas. A detainer had been filed against him and the record is without entry of any evidence that he requested or demanded an immediate trial.

Respectfully submitted,
Richard F. James
Richard F. James
Ass't. United States Attorney

State of Indiana,
County of Lake—ss:

AFFIDAVIT

Richard F. James, being first duly sworn upon oath, deposes and says the following:

1. That he is employed by the United States Department of Justice as an Assistant United States Attorney for the Northern District of Indiana, assigned to the Hammond, Indiana Division, and that he has held that position continuously since January 4, 1965.

2. That on December 14, 1965, he was the prosecutor for the United States in the prosecution of Manuel Zurita for violation of Section 2113(d) of Title 18 of the United States Code.

3. That the said defendant, Manuel Zurita, had been indicted on this charge by a Federal Grand Jury in June, 1965, along with one Jesse Paramo and Julian Perez, and that affiant was aware that the said Julian Perez was named in the indictment as a co-defendant, and also that Perez was at that time serving a sentence in the Arkansas State Penitentiary for armed robbery.

4. That in early November, 1965, affiant talked telephonically on two separate occasions to Captain A. D. Nisler, Head Warden, Arkansas State Penitentiary, Grady, Arkansas, regarding the possibility of Perez being made available by the Arkansas authorities to stand trial, along with Manuel Zurita, in the U. S. District Court, Hammond, Indiana.

5. That on both of those occasions, affiant was advised by Captain Nisler that Perez would not be made available to government authorities for trial in December, 1965, and that the Arkansas authorities would not comply with a Writ of Habeas Corpus ad Prosequendum if such a writ were to be issued by the Federal Court in Hammond.

6. That affiant was further notified by Captain Nisler that Perez would not be available to federal authorities prior to release from the Arkansas State Penitentiary, and that the earliest release date for the prisoner would be December 30, 1966.

7. Affiant thereafter made no further attempt to secure the presence of Perez in Hammond, Indiana for trial.

Richard F. James
Richard F. James
Ass't. United States Attorney

Subscribed and sworn to before me this 14th day of July, 1967.

Dorothy Carpenter
Deputy Clerk, U. S. District
Court, Northern District of Indiana

APPENDIX E.

TESTIMONY ON MOTION TO DISMISS

JULIAN PEREZ, being first duly sworn to testify the truth and nothing but the truth, was examined and testified as follows:

Direct Examination by Mr. Cohen.

Q. Would you state your name, please?

A. Julian Perez.

Q. And you are the same Julian Perez who is the defendant in this cause, are you not?

A. Yes, I am.

Q. Mr. Perez, inviting your attention to the year 1965, and particularly the month of June of 1965, where were you at that time?

A. Arkansas State Penitentiary.

Q. And how long had you been there?

A. I had been there about two years. I was admitted October the 5th or the 6th. It was early October of '63.

Q. Of '63 you were committed?

A. Yes.

Q. And why were you there?

A. Armed robbery committed in Garland County, Hot Springs, Arkansas.

Q. And what was your term of imprisonment?

A. Six years.

Q. Now, in June of '65, were you served or advised---strike that.

In June of '65, were you advised that a warrant had been issued out of this court for your arrest?

A. Yes, in June of '65, I was. I was called to the captain's office which—he is the superintendent, and he told me that he had gotten a call from Hammond, Indiana, and that I was charged with bank robbery, and they had asked him if they—if he would release me to come over here. That was the phone call, and that he told them that, no, that he didn't make it a practice of sending his boys out of State. There were his exact words.

Q. And what was the name of this warden?

A. Captain Dan Stevens.

Q. Now, at the time he advised you that that warrant had been issued for your arrest, did he tell you that you had a right to demand a speedy trial?

A. No, he didn't.

Q. Did anyone advise you that you had a right to demand a speedy trial on this charge you are now facing?

A. No, no one did.

Q. Were you aware that you had a right to demand a speedy trial?

A. No.

Q. Have you had any education or training in law?

A. No, I haven't.

Q. At the time you were confined in the Arkansas State Penitentiary and at the time that that warrant was read to you, were you ever advised of a right to counsel?

A. No, I wasn't.

Q. Did you ever have an opportunity to obtain counsel at the time this warrant was read to you?

A. No.

Q. Did you have an opportunity to obtain counsel after the warrant was read to you?

A. No. As a matter of fact, when they did come in with that warrant, I was in Captain Nisler's office, and I didn't know really what they were talking about, you

know, more or less; and other than the warrant—then, I asked him, I says—he wanted me to plead guilty to it, and I says, "No," I says, "I don't want to discuss this matter unless I have a lawyer of my own choosing," and he didn't respond either way.

Q. Now, if you had been aware that you had a right to demand immediate trial, would you have demanded it?

A. Yes.

Q. For what reason?

A. Because when you are there, well, in that institution anyway, if you have a hold, any hold—they call that a hold, you can't make parole. In other words, you have to flatten your sentence, what they call day per day, and you can't make no parole; and like I had been there about two years already, and I was—I knew that if I could make parole some kind of way, that I might have been able to make it, but with that hold, I wasn't able to. I mean, that was just common knowledge.

Q. And as a result of that detainer being placed upon you, were you required to serve the maximum sentence, the six-year term that was imposed on you?

A. Yes, I was.

Q. How much time did you actually serve?

A. A little over three and a half years.

Q. And the only time off you got was your good time allowance?

A. Yes.

Mr. Cohen: No further questions.

Cross Examination by Mr. James.

Q. Did you at any time request the right to have a trial?

A. I don't believe I did.

Q. Did you ever tell the warden or anyone else in authority in Arkansas that you wished to have a trial immediately?

A. No, I didn't; but I requested a lawyer because I didn't understand what that—all that writing was about, and they were talking to me, and that is when I—I asked if I would have a lawyer of my own choosing; that then I would discuss the matter with them further.

Well, I guess he just refused me, you know. He just smirked and looked away.

Q. Who is this?

A. Captain Nisler.

Q. And he is the warden, is that correct?

A. No, he is not the head—he is the Assistant Superintendent, is what his job is, but he is not the head man there. Captain Dan Stevens is the superintendent.

Q. Were you approached during the period of your imprisonment by agents of the FBI to discuss this matter?

A. They were there numerous times, but all the time they—all they wanted was me to make a confession, and they says, "If you make a confession—", one time I remember, they says, "If you make a confession here, then we will transfer the trial to Little Rock, and then that is —we would—then we will bring you to trial, but we will bring you to trial if you plead guilty now and sign this paper pleading guilty to the charge, and we will bring the trial to Little Rock, and then we will give you time here in Arkansas. We could run it together."

Q. They did discuss with you the charge, though, is that right?

A. Yes. Well, it was bank robbery.

Mr. James: No further questions.

Redirect Examination by Mr. Cohen.

Q. When the FBI agent talked to you about signing a confession, did they say—did they mention to you that you could follow what they called a Rule 20 proceeding, that you could plead guilty in that district?

A. Yes, they says I could plead guilty in that district, but—and that that is the only way that they would consider me bringing me to trial was if I plead guilty and bring me to Little Rock, which is the State Capital there.

Mr. Cohen: No further questions.

Mr. James: Nothing further.

Mr. Cohen: You may step down.

(Witness excused.)

Mr. Cohen: Defendant rests on the motion, your Honor.

The Witness: Thank you, your Honor.

Mr. Cohen: Does your Honor wish to hear any argument?

The Court: No, I think I know what the law is. (R. 3, l. 1—R. 9, l. 17). . . .

APPENDIX F.

AMERICAN BAR ASSOCIATION PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE

Standards Relating to

SPEEDY TRIAL

Recommended by the

ADVISORY COMMITTEE ON THE CRIMINAL TRIAL

Walter V. Schaefer, Chairman

(Reported in The Criminal Law Reporter, BNA, 1 Criminal Law 3136, July 5, 1967)

PART III. SPECIAL PROCEDURES: PERSON SERVING TERM OF IMPRISONMENT

3.1 Prosecutor's obligations; notice to and availability of prisoner.

To protect the right to speedy trial of a person serving a term of imprisonment either within or without the jurisdiction, it should be provided by rule or statute and, where necessary, interstate compact, that:

(a) If the prosecuting attorney knows that a person charged with a criminal offense is serving a term of imprisonment in a penal institution of that or another jurisdiction, he must promptly:

(i) undertake to obtain the presence of the prisoner for trial; or

(ii) cause a detainer to be filed with the official having custody of the prisoner and request him to so advise the prisoner and to advise the prisoner of his right to demand trial.

(b) If an official having custody of such a prisoner receives a detainer, he must promptly advise the prisoner of the charge and of the prisoner's right to demand trial. If at any time thereafter the prisoner informs such official that he does demand trial, the official shall cause a certificate to that effect to be sent promptly to the prosecuting attorney who caused the detainer to be filed.

(c) Upon receipt of such certificate, the prosecuting attorney must promptly seek to obtain the presence of the prisoner for trial.

(d) When the official having custody of the prisoner receives from the prosecuting attorney a properly supported request for temporary custody of such prisoner for trial, the prisoner shall be made available to that prosecuting attorney (subject, in cases of interjurisdictional transfer, to the traditional right of the executive to refuse transfer and the right of the prisoner to contest the legality of his delivery).

3.2 Computation of time

The time for trial of a prisoner whose presence for trial has been obtained while he is serving a term of imprisonment should commence running from the time his presence for trial has been obtained, subject to all the excluded periods listed in section 2.3. If the prosecuting attorney has unreasonably delayed (i) causing a detainer to be filed with the custodial official, or (ii) seeking to obtain the prisoner's presence for trial in lieu of filing a detainer or upon receipt of a certificate of demand, such periods of unreasonable delay should also be counted in ascertaining whether the time for trial has run.

PART IV. CONSEQUENCES OF DENIAL OF SPEEDY TRIAL

4.1 Absolute discharge.

If a defendant is not brought to trial before the running of the time for trial, as extended by excluded periods, the consequence should be absolute discharge. Such discharge should forever bar prosecution for the offense charged and for any other offense required to be joined with that offense. Failure of the defendant or his counsel to move for discharge prior to trial or entry of a plea of guilty should constitute waiver of the right to speedy trial.

4.2 Release on recognizance.

If a shorter time limitation is applicable to defendants held in custody, the running of this time should only require release of such a defendant on his own recognizance.

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320-588—68——1

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 432

JULIAN PEREZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1–7) has not been officially reported.

JURISDICTION

The judgment of the court of appeals was entered on July 31, 1968. The petition for a writ of certiorari was filed on August 23, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner was denied the right to a speedy trial.

STATEMENT

Petitioner was convicted by a jury in the United States District Court for the Northern District of Indiana of armed robbery of a federally insured bank, in violation of 18 U.S.C. 2113(d), and on September 13, 1967, was sentenced to 20 years' imprisonment (Pet. 3). The court of appeals affirmed (Pet. App. 1–7).

1. The robbery was committed on November 20, 1961 (A. 1).[1] In June 1964, co-defendant Paramo, while confined in a tuberculosis hospital, made a confession implicating petitioner and co-defendant Zurita. Paramo was arrested upon his release from the hospital in April 1965 (Pet. App. 4), and a complaint was filed with a United States Commissioner charging the three defendants with the robbery.[2] An indictment was returned on June 23, 1965 (A. 1; Pet. 3; Pet. App. 1). At that time petitioner was confined in the Arkansas State Penitentiary, to which he had been committed in October 1963 to serve a six-year sentence for armed robbery (Pet. App. 10, 15). On about June 30, 1965, petitioner was served in the Arkansas prison with a copy of the indictment, and a federal detainer was lodged against him with the prison officials (Pet. App. 10, 13, 17).

[1] "A." refers to the appendix to petitioner's brief in the court of appeals, a copy of which is on file with the Clerk of this Court.

[2] The opinion of the court of appeals and the petition refer to the filing of an "information" in April 1965 (Pet. App. 1; Pet. 3). We are advised by the United States Attorney that the document to which the court and petitioner apparently refer is the complaint filed with a United States Commissioner on April 20, 1965.

In early November 1965, the Assistant United States Attorney in charge of the prosecution twice sought to secure the cooperation of the Arkansas prison officials in obtaining temporary custody of petitioner so that he could stand trial with Zurita [3] in the Northern District of Indiana. On both occasions, the Head Warden, Captain A. D. Nisler, stated that petitioner would not be made available for this purpose prior to his discharge from prison upon completion of his sentence, and that the earliest release date would be December 30, 1966. The warden further advised the prosecutor that, if served with a writ of habeas corpus *ad prosequendum* issued by the district court, the Arkansas authorities would not comply with it (Pet. App. 14, 16). When these efforts proved unavailing, the prosecutor proceeded against co-defendant Zurita alone (Paramo having previously pleaded guilty) at a trial held in December 1965 (Pet. 3; Pet. App. 14).

On March 10, 1967, petitioner completed service of his Arkansas sentence,[4] and he was removed by federal authorities to the Northern District of Indiana to answer to the indictment (Pet. App. 2). Prior to trial, he moved to dismiss the indictment on the ground that his right to a speedy trial had been violated (Pet. App. 10–11). The government filed a

[3] Paramo pleaded guilty and testified as a government witness at the trials of both Zurita and petitioner (Pet. 3).

[4] Petitioner had served approximately 3½ years of the six-year sentence. The difference between the time served and the full term was apparently attributable to earned good-time allowances (Pet. App. 15, 17).

memorandum in opposition to the motion and a supporting affidavit reciting the foregoing efforts to secure petitioner's custody for trial (Pet. App. 12–14). At a hearing on the motion, petitioner acknowledged that he had at no time requested that he be tried promptly on the indictment while he was confined in the Arkansas penitentiary (Pet. App. 17). He stated that he had not been aware of his right to a speedy trial and that no one had advised him of the right (Pet. App. 16). Although he had discussed the pending indictment with the Arkansas prison authorities, he stated that he had not mentioned his desire for a speedy trial to them (Pet. App. 16–17, 18). He testified that in a discussion with the warden concerning the possibility of his pleading guilty to the indictment, he advised the warden that he did not wish to discuss the matter with anyone other than a lawyer of his own choosing (Pet. App. 16–17).

The motion to dismiss was denied (A. 13), and petitioner was brought to trial in July 1967 (Pet. 3).

2. Petitioner does not challenge the sufficiency of the evidence to sustain the conviction. The government's evidence at trial showed that petitioner, Zurita, and Paramo obtained entry to the home of the bank manager by pretending to be deputy sheriffs, that they held the manager and his wife captive all night, and that in the morning petitioner and Zurita forced the manager to open the bank's vault and night depository. Paramo testified that he remained at the home with the bank manager's wife for about 15 minutes after the others had departed (Pet. App. 2).

Petitioner's defense was that he was at work on the day of the robbery, Monday, November 20, 1961. His wife testified that he was at home on the night of Sunday, November 19, because he had never stayed away all night at any time since they were married. She said he always worked on Mondays because Tuesday was his day off in 1961. Two fellow employees testified that they thought that Tuesday was petitioner's day off in 1961, but neither could remember positively because of the lapse of time. A work record showed that petitioner had worked 40 hours during a period which included Monday, November 20, but it did not indicate which days he had worked (Pet. App. 2–3). Petitioner did not testify in his own behalf.

In rebuttal, F.B.I. Agent Dumaine testified to a contemporary record of a statement made in 1963 by one of the employees who appeared as a defense witness that petitioner's regular day off was Monday. At trial, the witness did not recall making that statement. A partner in the concern, Mitchell Obuchowski, subsequently told Agent Dumaine that petitioner's day off was Tuesday, but then returned after a conversation with Edward Rzeznick, the other employee who testified ~~for the defense~~, and told the agent it was Monday (Pet. App. 3).

ARGUMENT

Petitioner does not contend that the government was responsible for the three years and five months delay between the commission of the offense (November 20, 1961) and the filing of the complaint with the

commissioner in April 1965.[5] His sole objection relates to the substantially lesser period of two years and three months between the filing of the complaint and the trial in July 1967, and particularly to the 19-month period between Zurita's trial and his own conviction. (Pet. 6, 8). The court of appeals correctly held that the delay complained of was likewise not the fault of the government; that any objection was waived by petitioner's failure to request a prompt trial; and that in all events, there was no prejudice.

1. The record shows that the government made every reasonable effort to secure the presence of petitioner for a joint trial with Zurita, but was prevented from doing so by the refusal of the Head Warden of the Arkansas State Penitentiary to make petitioner available to the federal authorities for that purpose. The essence of petitioner's contention is that the government should have applied to the district court in Indiana for a writ of habeas corpus *ad prosequendum*, directing the Arkansas warden to surrender temporary custody of petitioner so that he could be brought to trial on the federal indictment. But, as the court below pointed out, the efficacy of a federal writ

[5] As the court of appeals observed, while Paramo's confession, in June 1964, was a turning point in the F.B.I.'s investigation of the crime, it did not terminate the investigation (Pet. App. 4). In denying petitioner's motion to dismiss the indictment, the district court, referring to its own recollection of the Zurita trial (held in December 1965), commented that the time lapse between the offense and the return of the indictment could not be charged to the government because there had been a "lack of sufficient identity and evidence" to warrant earlier indictment (A. 13). Petitioner does not challenge the court's statement.

of habeas corpus *ad prosequendum* issued with respect to a prisoner in State custody requires the consent of the responsible State authorities. *Strand* v. *Schmittroth*, 251 F. 2d 590, 599 (C.A. 9), certiorari dismissed, 355 U.S. 886; *United States ex rel. Moses* v. *Kipp*, 232 F. 2d 147, 150 (C.A. 7); *Stamphill* v. *Johnston*, 136 F. 2d 291, 292 (C.A. 9), certiorari denied, 320 U.S. 766. Compare *Ponzi* v. *Fessenden*, 258 U.S. 254, 261–263 (transfer of federal prisoner to State authorities for purposes of prosecution held authorized *if consented to by the Attorney General*); *Carbo* v. *United States*, 364 U.S. 611, 621 n. 20 (writ *ad prosequendum* directed to New York City prison official who voluntarily honored it sustained as against claim that the federal writ did not properly run beyond the territorial limits of the issuing court; "In view of the cooperation extended by the New York authorities in honoring the writ, it is unnecessary to decide what would be the effect of a similar writ absent such cooperation"). See also *Hebert* v. *Louisiana*, 272 U.S. 312, 315–316.

It is evident, therefore, that the Arkansas authorities could successfully have resisted a writ *ad prosequendum* had the prosecutor sought and obtained one. In view of the warden's expressed intention not to comply with such a writ, and the fact (not disputed by petitioner, see Pet. 6) that the relevant Arkansas statutes are, as the court below observed, merely "permissive in nature and not obligatory" (Pet. App. 5), the prosecutor reasonably decided that further

steps to secure petitioner's presence for trial before the completion of his State sentence would be bootless.[6]

2. Petitioner's failure to demand an immediate trial after being served with a copy of the federal indictment precluded his later objection based on an alleged denial of his Sixth Amendment right. *United States* v. *Maxwell,* 383 F. 2d 437, 441 (C.A. 2), certiorari denied, 389 U.S. 1043 (*sub nom. Aiken* v. *United States*) and 1057. The fact that petitioner was in custody when he learned of the indictment and was not, according to his testimony, advised at that time of his right to demand a speedy trial may be taken into account in determining whether petitioner intelligently waived his right to be brought to trial as promptly as circumstances would permit (cf. *United States* v. *Chase,* 135 F. Supp. 230 (N.D. Ill.). See also *United States* v. *Lustman,* 258 F. 2d 475, 478 (C.A. 2), certiorari denied, 358 U.S. 880; *United States* v. *Hill,* 310 F. 2d 601, 603 (C.A. 4)).[7] But these factors are of

[6] Petitioner's reliance on *People* v. *Winfrey,* 20 N.Y.2d 138 (1967) (Pet. 6–7), is misplaced. The court held that a delay of more than five years in bringing the accused to trial while he was incarcerated in Alabama was unreasonable, and ordered the charges dismissed. The critical distinction between *Winfrey* and the present case, however, is the fact that the New York authorities made no effort whatever to return the accused to New York for seasonable trial. The court observed that if the New York authorities had asked the Alabama officials to surrender the accused for purposes of prosecution, the denial of such a request "would, of course, [have been] an excuse" (20 N.Y. 2d at 144).

[7] *Pitts* v. *North Carolina,* 395 F. 2d 182 (C.A. 4), cited by petitioner (Pet. 11–12), involved a prisoner-accused against whom the charge in issue had been pending for seven years without his knowledge (395 F. 2d at 187) and is thus clearly distinguishable from this case.

minimal significance in this case in view of petitioner's apparent sophistication in criminal procedure (see Pet. App. 16–17).

3. Finally, there is no more than a speculative basis for a claim of prejudice arising from the fact that petitioner's trial was held 19 months after the earliest practicable date on which it could have been held—December 1965, when Zurita was tried—if the Arkansas authorities had cooperated in making petitioner available. The only possible prejudice which can fairly be inferred relates to the testimony of petitioner's two fellow employees, ~~who were offered as alibi witnesses~~. They testified that they thought that petitioner's day off from his job in 1961 was Tuesday, from which the jury was asked to infer that petitioner was at work on the day of the robbery, a Monday. Whatever value that testimony may have had was diminished by the fact that the witnesses could not testify positively on the point because of the lapse of time (p. 5, *supra*). But any supposition that these witnesses might have had clearer recollections in December 1965 than they had in July 1967 of petitioner's work schedule for November 1961 would be, as the court of appeals noted, "mere conjecture" (Pet. App. 3).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.
FRED M. VINSON, JR.,
Assistant Attorney General.
PHILIP R. MONAHAN,
Attorney.

SEPTEMBER 1968.

U.S. GOVERNMENT PRINTING OFFICE: 1968